GOH MUI LAN

v.

TEH YOKE SEW

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[ORIGINATING SUMMONS NO. 24-223-93]
24 MARCH 1994

PRACTICE & PROCEDURE: Authority to act - Representation by a person who is not an advocate and solicitor - Whether such representation is prohibited or whether it falls under the category of persons permitted to act as an advocate and solicitor such as an arbitrator - Arbitration Act 1952, ss. 2 & 3 - Legal Profession Act 1976, ss. 37 & 38(1)(f).

The applicant in this case was one of the beneficiaries to the estate of one Goo Keng Hee (deceased) and she applied for an order to remove the respondent as the executrix of the estate and to appoint herself instead. The applicant was represented by an advocate and solicitor at the hearing of the application in chambers while the respondent was represented by one Hardial Singh Sekhon who was not an advocate and solicitor. The applicant's Counsel raised a preliminary objection in respect of Hardial Singh representing the respondent on the ground that s. 37 of the Legal Profession Act 1976 prohibited him from so acting. The said Hardial Singh contended that he had the authority to act as an advocate and solicitor by reason of s. 38(1)(f) of the said Act as he claimed he had been duly appointed as an arbitrator to settle the disputes between the beneficiaries pursuant to an arbitration agreement dated 18 April 1993 made between him and the respondent in her capacity as the executrix of the estate of the deceased.

The preliminary objection was upheld. The said Hardial Singh applied for further arguments and at the hearing of the further arguments he submitted that apart from being an arbitrator by reason of the said agreement he was also appointed as an arbitrator pursuant to clause 144 of the Articles of Association of a company known as Cenmar Forwarding Sdn. Bhd.

Held:

[1] In order to qualify under paragraph (f) of s. 38(1) of the Legal Profession Act 1976 the Court must be satisfied that firstly the person is an arbitrator duly appointed under the Arbitration Act 1952 and secondly as a duly appointed arbitrator that person appears in Court for the purposes of settling or attempting to settle the dispute between the parties to the arbitration.

[2] Under the Arbitration Act a duly appointed arbitrator is one who is appointed under a written agreement to submit present or future differences to arbitration. Although the Act is silent, the written agreement envisaged under the Act is not of a nature similar to the agreement in this case as only the intended or proposed arbitrator and one of the parties to the dispute are the parties to the agreement. The written agreement envisaged is of a nature where all the parties to the arbitration proceedings are parties to the agreement. As the agreement was not the one envisaged by the Arbitration Act the said Hardial Singh was not an arbitrator duly appointed under the Act.

[3] Assuming that the requirement of duly appointed arbitrator had been met the other requirement of appearing in Court for the purposes of settling or attempting to settle the disputes between the parties to the arbitration is not satisfied. The said Hardial Singh came to Court appearing as an advocate for one of the parties to the dispute namely the respondent. He was not acting as an impartial arbitrator and was an adversary to the applicant who was one of the parties to the dispute.

[4] The argument that the said Hardial Singh had been duly appointed as an arbitrator pursuant to clause 144 of the Articles of Association of Cenmar Forwarding Sdn. Bhd. had no merit as the alleged appointment had not been averred to at all by the respondent in her affidavit and neither was the Articles of Association exhibited in the affidavit.

[5] The said Hardial Singh cannot act as an advocate and solicitor for the respondent as he does not qualify under s. 38(1)(f) of the Legal Profession Act.

[Decision upholding objection confirmed with costs to the applicant].

Legislation referred to:
Arbitration Act 1952, ss. 2 & 3
Legal Profession Act 1976, ss. 37, 38(1)(f)

For the applicant - Vincent Lawrence; M/s. Lawrence & Co.
For the respondent - Respondent in person

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC:
The applicant, Goh Mui Lan, is one of the beneficiaries of the estate of Goo Keng Hee, deceased. The respondent, Teh Yoke Sew, named in the will of deceased as the executrix, was granted probate to administer the estate of the deceased. The applicant and the other benefeciaries of the estate for some reasons (as alleged in the affidavit) are not happy with the way the respondent administers the estate. She, with the support of the other benefeciaries, applies to this Court for, *inter alia*, an order to remove the respondent and to appoint herself instead as the executrix of the estate.

The application was heard before me in chambers on 2 September 1993. The applicant was represented by Encik Vincent Lawrence whilst the respondent was represented by Encik Hardial Singh Sekhon who is not an advocate and solicitor. At the commencement of the hearing, Encik Lawrence, by way of preliminary objection, objected to Encik Hardial Singh representing the respondent on the ground that s. 37 of the Legal Profession Act 1976 prohibits the latter from so acting. Encik Hardial Singh maintained that he had the authority to act as an advocate and solicitor by reason of s. 38(1)(f) of the Act which reads:

> 38. Certain persons can act as advocate and solicitor
>
> (1) Section 37 shall not apply to -
>
> (a) ...
>
> (f) any arbitrator or umpire lawfully acting under any written law relating to arbitration, settling or attempting to settle the dispute between the parties to the arbitration;

Encik Hardial claimed that he had been duly appointed as an arbitrator to settle the disputes between the benefeciaries pursuant to an arbitration agreement dated 18 April 1993 made between himself and the respondent in her capacity as the executrix of the estate of the deceased.

After hearing the submissions I upheld the preliminary objection. Encik Hardial applies for further arguments.

At the hearing of the further arguments, Encik Hardial submits that not only was he appointed as an arbitrator by the arbitration agreement mentioned earlier (see Exh. TH1 of encl. 12), he was also appointed as an arbitrator pursuant to Clause 144 of the Articles of Association of a company known as Cenmar Forwarding Sdn. Bhd.

Encik Hardial's argument that he has been duly appointed as an arbitrator pursuant to Clause 144 of the Articles of Association of Cenmar Forwarding Sdn. Bhd. can be briefly disposed of as having no merit at all by reason of the fact that the alleged appointment under the Articles of Association has never been averred to at all by the respondent in her affidavit nor is the Articles of Association exhibited in the affidavit.

Now as to the claim that he is duly appointed pursuant to the agreement in Exh TH1, I wish to begin by referring to s. 38(f) of the Legal Profession Act. In order for Encik Hardial to qualify under paragraph (f), he must satisfy the Court that -

(a) he is an arbitrator duly appointed under the Arbitration Act 1952 (Revised-1972); and

(b) as a duly appointed arbitrator, he appears in Court for the purpose of settling or attempting to settle the dispute between the parties to the arbitration.

As to (a), is Encik Hardial duly appointed as an arbitrator under the Arbitration Act? Section 3 of the Arbitration Act states:

> 3. Authority of arbitrators and umpires to be irrevocable
>
> The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court.

"Arbitration agreement" is defined by s. 2 of the Act as follows:

> "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;

As I see it, the effect of reading s. 3 together with the definition of "arbitration agreement" is that a person may consider himself as a duly appointed arbitrator under the Arbitration Act only if he is duly appointed under a written agreement to submit present or future differences to arbitration. Although the Act is silent,

in my opinion, the written agreement envisaged under the Act is not of a nature similar to the agreement as in Exh. TH1 where only the intended or proposed arbitrator and one of the parties to the dispute are parties to the agreement. To my mind, the written agreement envisaged is of a nature where all the parties to the arbitration proceeding are parties to the agreement. Since the agreement in Exh. TH1 is not one that is envisaged by the Arbitration Act, therefore, with respect, Encik Hardial Singh cannot be said to have been duly appointed as an arbitrator under the Arbitration Act.

Even assuming that Encik Hardial Singh is a duly appointed arbitrator under the Arbitration Act, yet he does not satisfy requirement (b). As a matter of fact, Encik Hardial has come to Court to appear before me as an advocate for one of the parties to the dispute, that is, he has come to Court to appear and to argue a case on behalf and in the interest of only of the respondent. He is not here to act as an impartial arbitrator. He is here as an adversary to the applicant who is also one of the parties to the dispute. Therefore, with due respect, he cannot be said to have come to Court to settle or attempt to settle a dispute between parties to the arbitration.

In conclusion, Encik Hardial does not qualify under s. 38(f) of the Legal Profession Act. As such, he cannot act as an advocate and solicitor for the respondent.

I therefore confirm the decision made in chambers on 6 October 1993, with costs to the applicant.

KANG KOK HIANG & 2 ORS.

v.

ONG KAH HOE

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. 22-7-1989]
18 OCTOBER 1993

LAND LAW: Defendant registered proprietor of undivided half share of land - Plaintiffs seeking declaration that defendant only entitled to an undivided $^{5}/_{11}$ share of the land - Whether defendant's title to the land defeasible.

PRACTICE & PROCEDURE: Limitation - Accrual of plaintiffs right of action - Whether limitation period exceeded - Application of s. 9(1) of the Limitation Act 1953.

The plaintiffs sought a declaration that they are entitled to an undivided $^{6}/_{11}$ share of a piece of land (the Land) together with the six shophouses erected thereon and that the defendant is entitled to an undivided $^{5}/_{11}$ share of the Land together with the five shophouses erected thereon.

The plaintiffs contended that the defendant was a trustee or volunteer in respect of the extra shophouse, he having been informed by his predecessor in title and thereby having had notice of his entitlement being limited to $^{5}/_{11}$ undivided share as per the terms of the agreement dated 17 July 1966 entered into between the plaintiffs and the defendant's predecessors in title. The plaintiffs argued that the defendant had committed fraud by refusing to give effect to the terms of the agreement and by refusing to subdivide or partition the Land in accordance to the terms of the agreement.

The defendant claimed that he had no knowledge of the agreement when he purchased the undivided half share of the Land which he did so in good faith and for valuable consideration. The defendant conterclaimed for a declaration that he on the one hand and the plaintiffs jointly on the other hand were the co-owners each owning a half undivided share in the Land.

Held:

[1] The defendant being the registered proprietor of an undivided half share of the Land his title thereto, pursuant to the provisions of s. 340(1) of the National Land Code 1965, is